

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 5, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP660-CR

Cir. Ct. No. 2012CF1367

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL M. OWENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Daniel Owens appeals a judgment of conviction for first-degree reckless homicide and armed robbery with use of force, both as party to a crime, and for being a felon in possession of a firearm. Owens also appeals two circuit court orders denying his motion for postconviction relief.¹ Owens argues that he received ineffective assistance of counsel because his trial counsel could have done more to impeach or neutralize two prosecution witnesses. Because we conclude that Owens' counsel was not ineffective, we affirm.

BACKGROUND

¶2 Owens was charged with first-degree intentional homicide as a party to the crime, armed robbery by use or threat of use of a dangerous weapon as a party to the crime, and possession of a firearm by a felon, all as a repeater. According to the criminal complaint, the victim made plans with Owens' associate, Bobby Hogans, to conduct a drug deal. When the victim and Hogans arrived at the apartment building designated for the drug deal, Owens shot the victim.

¶3 Owens' claims of ineffective assistance of counsel relate to trial counsel's cross-examination of two prosecution witnesses: Hogans and county medical examiner Dr. Vincent Tranchida. We recount some of their testimony and information to provide context for the discussion that follows.

¶4 Hogans testified that he and Owens initially agreed to sell drugs to the victim, but they later decided to rob the victim instead. The victim, Owens,

¹ In its initial order denying postconviction relief, the circuit court did not address one aspect of Owens' ineffective assistance of counsel claims, so Owens filed a motion for reconsideration. The court then issued a supplemental decision and order.

and Hogans were all armed when they entered the designated apartment building together. Owens then pulled out a gun and demanded the victim's money while Hogans struggled to get control of the victim's gun. According to Hogans, Owens shot the victim during the struggle.

¶5 Medical examiner Dr. Tranchida testified based on his autopsy of the victim. Dr. Tranchida testified that the victim died from a gunshot wound to the torso. Dr. Tranchida also gave his opinion that the gun had been fired from at least 30 to 36 inches away from the victim. This opinion was based in part on the absence of visible gunshot residue on the victim's shirt.

¶6 During closing arguments, Owens' trial counsel argued that Hogans was the shooter and that the jury should be skeptical of Hogans' version of events because testifying against Owens was "[Hogans'] only way out." Owens' counsel further argued that there was no evidence, other than Hogans' self-serving testimony, that Owens was involved in the plan to rob the victim. Instead, Hogans' testimony established that Hogans was the primary force behind the robbery and shooting, and that Hogans was the one who was behaving aggressively immediately before the shooting. Moreover, based on Hogans' testimony that Owens entered the apartment building first, followed by the victim and then Hogans, trial counsel argued that it would have been impossible for Owens to move behind Hogans and the victim, as they were struggling over the victim's gun, in order to shoot the victim in the torso. Regarding Dr. Tranchida's testimony, Owens' counsel argued that Dr. Tranchida's opinion was unreliable because it was impossible to determine with precision where anyone was in the hallway during the struggle over the victim's gun.

¶7 The jury convicted Owens of the lesser-included offense of first-degree reckless homicide as a party to the crime, plus the two remaining counts of armed robbery with use of force as party to a crime and being a felon in possession of a firearm. Owens filed a motion for postconviction relief, arguing that he received ineffective assistance of counsel due to trial counsel’s alleged failure to thoroughly cross-examine Hogans and Dr. Tranchida. The circuit court denied this motion after a *Machner*² hearing. Owens now appeals.

DISCUSSION

¶8 To establish ineffective assistance of counsel, Owens must show that his counsel’s performance was deficient and that such performance prejudiced his defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to establish deficient performance, a defendant must identify counsel’s specific acts or omissions that fell “outside the wide range of professionally competent assistance.” *Id.* at 690. Merely showing that “counsel was imperfect or less than ideal” is not sufficient to satisfy this standard. *State v. Burton*, 2013 WI 61, ¶48, 349 Wis. 2d 1, 832 N.W.2d 611 (quoted source omitted).

¶9 In order to establish prejudice, Owens must show that the alleged defect in counsel’s performance “actually had an adverse effect on the defense.” See *Strickland*, 466 U.S. at 693. This requires a defendant to show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; see also *State v. Lepsch*, 2017 WI 27, ¶48, 374 Wis. 2d 98, 892 N.W.2d 682; *State v. Thiel*, 2003 WI 111, ¶20,

² See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

264 Wis. 2d 571, 665 N.W.2d 305. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “[M]erely showing that the error had some conceivable effect on the outcome” is not sufficient to satisfy this standard. *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885.

¶10 We do not need to address both components of the analysis if a defendant makes an inadequate showing on one. See *Strickland*, 466 U.S. at 697.

¶11 Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. *State v. Alexander*, 2015 WI 6, ¶15, 360 Wis. 2d 292, 858 N.W.2d 662. A circuit court’s factual findings will be upheld unless those findings are clearly erroneous. See *id.* “[T]he circumstances of the case and the counsel’s conduct and strategy” are considered findings of fact. *State v. Jenkins*, 2014 WI 59, ¶38, 355 Wis. 2d 180, 848 N.W.2d 786. “However, whether counsel’s performance was deficient and whether a defendant was prejudiced thereby, present questions of law that we review independently.” *Alexander*, 360 Wis. 2d 292, ¶15.

*Whether Owens’ Trial Counsel Was Ineffective with Respect to
Counsel’s Cross-Examination of Hogans*

¶12 Owens argues that his trial counsel rendered ineffective assistance by failing to use all of the available impeachment material in cross-examining Hogans. For the reasons below, we conclude that Owens’ trial counsel’s performance was not deficient and that Owens did not suffer prejudice within the meaning of *Strickland*.

¶13 Owens points to close to a dozen discrepancies between the testimony that Hogans gave at trial and prior statements that Hogans made to

police and trial counsel's failure to highlight these inconsistencies while questioning Hogans. These inconsistent statements relate to whether the purpose of the meeting with the victim was to conduct a drug deal or to rob him; the details of the shooting and its aftermath; and Hogans' motivation for cooperating with police.

¶14 At the outset, we note that Owens' trial counsel did take steps to impeach Hogans. The circuit court found that Owens' counsel impeached Hogans three times. Owens points to additional fodder for impeachment, but we see no effort to address the utility of additional impeachment. Owens seemingly assumes that more impeaching questions would necessarily have resulted in more effective impeachment that would have changed the outcome of the trial. We disagree.

¶15 Most of the other impeachment material strikes us as neutral at best. For example, Owens highlights discrepancies in the specific order of events during the struggle and shooting. Was it "struggle, gunshot – then gun loose," as Hogans testified at trial? Or was it "struggle, gun loose – then gunshot," as Hogans told police earlier? Likewise, Owens points to Hogans' inconsistent statements about the order of entry into the building where the shooting occurred: was it Owens, victim, Hogans, as Hogans testified at trial, or was it Hogans, victim, Owens, as Hogans told police? Owens does not persuade us that alerting the jury to any of these inconsistent statements, individually or collectively, would have affected the outcome.

¶16 We also observe that Owens' counsel testified that he chose not to challenge Hogans' trial testimony so that counsel could then argue that, based on this testimony, Owens could not have been the shooter. Specifically, during trial, counsel asked Hogans to mark an exhibit showing the relative positions of each

individual upon entering the apartment building immediately before the shooting. Owens' counsel then used this exhibit to argue that Owens could not possibly have been the shooter, given the order in which Hogans testified they entered the building. Although hindsight tells us that this defense strategy was unsuccessful, hindsight plays no part in our analysis. See *Strickland*, 466 U.S. at 689. Counsel's choice of strategy was within "the wide range of professionally competent assistance" necessary to satisfy the constitutional standard for effective assistance of counsel. See *id.* at 690.

¶17 Owens also argues that his trial counsel could have made better use of the possibility that Hogans lied to police in order to protect third persons, including Hogans' cousin. However, Owens does not explain how his trial counsel might have used this information, nor is its significance obvious to us.

¶18 Owens contends that his trial counsel could have done more to illustrate Hogans' "utter contempt for telling the truth" by calling attention to Hogans' dramatic and self-serving lies during the police interrogation. However, it would have been apparent to the jury prior to the cross-examination of Hogans that Hogans lied to the police. The prosecutor obtained at least five separate admissions from Hogans that he had lied to police.

¶19 In sum, nothing Owens points to persuades us that Owens' counsel's performance was deficient or that Owens was prejudiced as to Hogans.

*Whether Owens' Trial Counsel Was Ineffective With Respect to
Counsel's Cross-Examination of Dr. Tranchida*

¶20 Owens next contends that his trial counsel was ineffective for not taking additional steps to undermine or neutralize Dr. Tranchida's opinion that the shooter was at least 30 to 36 inches away from the victim. This opinion was based

in part on Dr. Tranchida's testimony that he did not observe any gunshot residue on the victim's shirt. Owens argues that counsel was ineffective for not making a greater effort to cross-examine Dr. Tranchida more extensively on this point.

¶21 There are two problems with this argument. First, Owens' trial counsel did cross-examine Dr. Tranchida on this point. In fact, Dr. Tranchida admitted during cross-examination that he did not use a microscope to look for gunshot residue during his autopsy because he believed that to be the State Crime Lab's function. Dr. Tranchida also admitted that the distance necessary to create a mark on a shooting victim's clothes varies from weapon to weapon. While these questions did not go as far as Owens would like, the cross-examination was easily sufficient to cast doubt on Dr. Tranchida's opinion. *See Thiel*, 264 Wis. 2d 571, ¶19 (“Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.” (quoted source omitted)).

¶22 Second, the circuit court determined that Dr. Tranchida's distance testimony “did not play a significant role in the trial.” Owens argues that the circuit court was wrong about this. Owens contends that the critical issue in this case was the precise distances of Hogans and Owens from the victim at the time of the shooting. We, however, agree with the circuit court that distinctions based on inches would not have been significant to the jury. More specifically, there was nothing about the physical evidence or testimony that presented a clear picture of the struggle or the positions of the parties such that Dr. Tranchida's distance testimony was significant. Thus, even if we were to agree that the cross-examination of Dr. Tranchida was deficient, Owens has not established prejudice.

*Whether the Alleged Deficiencies of Owens' Trial Counsel, Taken Together,
Undermine Confidence in the Outcome*

¶23 Owens' last argument is that we should grant a new trial based on the cumulative effect of trial counsel's mishandling of these two prosecution witnesses. *See id.*, ¶59 (adopting the reasoning that, "[W]hen a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice."). Not only is this argument undeveloped, it is also without merit. As discussed above, we see few if any deficiencies in the performance of Owens' trial counsel, much less anything that undermines our confidence in the outcome.

CONCLUSION

¶24 Because we conclude that Owens' trial counsel was not ineffective, the circuit court properly denied Owens' motion for postconviction relief. We therefore affirm these orders, as well as the judgment of conviction.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

